

U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)



Issue Date: 08 December 2003

Case No. 2001-LHC-1821
OWCP NO. 10-37339

In the Matter of

SARAH JEFFERSON,

Claimant,

v.

FEDERAL MARINE TERMINALS,

Employer,

and

FRANK GATES ACCLAIM,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Respondent.

ORDER OF DISMISSAL

The above-captioned matter is currently before the undersigned. This order is in response to the Employer's Motion to Dismiss for Want of Prosecution filed October 17, 2003.

This claim has been scheduled for hearing and subsequently continued four times in the last three years. Originally, the claim was scheduled to heard on July 20, 2001. This hearing was continued due to the fact that Counsel for the Employer had scheduled a vacation for that week.

The hearing was rescheduled for July 10, 2002. This hearing was continued based on the Claimant's request for additional time for the development of medical evidence. The Employer had no objections to this continuance.

The hearing was thereafter rescheduled to December 3, 2002. On November 8, 2002, the Claimant's then-counsel, Robert A. Wilson, filed a motion to withdraw as the Claimant's attorney. In his motion, Mr. Wilson stated that the Claimant informed him that she preferred to proceed with another attorney. On November 14, 2002, I issued a Show Cause Order to determine if the hearing should take place as scheduled in light of Mr. Wilson's withdrawal. During a conversation on November 25, 2002 with my attorney-advisor, Ms. Jefferson indicated that she wished to proceed with the hearing on December 3, 2003, and represent herself as a *pro se* claimant. Despite this assertion, Ms. Jefferson attended the December 3, 2003 hearing only to request a continuance in order to engage the services of a new attorney. She indicated that she had already contacted an attorney, but that the attorney was not able to appear or develop the case fully yet. The Employer, who was represented by counsel and ready to proceed, stated that it would not object to another continuance. At that time, I indicated that a hearing would be scheduled for, at the latest, March of 2003. During this hearing I also admonished the Claimant that "the next time we need to go to hearing on this case. . . so, get your attorney moving and get prepared."

The hearing was rescheduled for March 19, 2003. In attendance was Ms. Jefferson, without counsel. Mr. Hart, who represents the Employer, was not present due to inadvertently believing that the hearing was to take place the following day. Ms. Jefferson requested a continuance in order to find an attorney. Counsel for the Employer stated that under the circumstances he would have no objection. Given that Mr. Hart was not present and Ms. Jefferson was unprepared, I granted Ms. Jefferson's request for a continuance. I further admonished Ms. Jefferson stating:

Judge Roketenetz: You have to get yourself working and find yourself an attorney. We can't keep continuing your case. You need to do that. Do you understand?

Ms. Jefferson: I appreciate that.

Judge Roketenetz: All right, because judges come in from other cities to provide a forum for you and that involves getting the services of the court reporter. There is a lot of expense associated with that.

Ms. Jefferson: I can do that, Your Honor.

Judge Roketenetz: Okay. So I am asking you to, as soon as you can get yourself an attorney if you are going to do that ... and make sure your attorney files an appearance with us and that he or she is ready to proceed the next time it is called for hearing. Okay?

Ms. Jefferson: Thank you, Your Honor.

Judge Roketenetz: Okay, now alternatively, if you can't find an attorney, what you need to do is to get all your paperwork and be prepared to come here with all your paperwork and get it submitted to the court and whoever the judge is will do the best he or she can to help you develop your testimony and then make a decision in this case. But you have to be prepared to go the next time.

The hearing was rescheduled for October 15, 2003. At this hearing, attended by Ms. Jefferson and counsel for the Employer, Ms. Jefferson again asked for another continuance, stating that she had obtained an attorney whose name she could not remember and that the attorney wanted her to ask for a continuance. The Employer objected stating that it was again ready to proceed. Again, I admonished the Claimant that she could not keep continuing this case at the expense of the Employer and judicial resources.

Judge Roketenetz: All right. Mrs. Jefferson, I've continued this case personally on two prior occasions to afford you time to get an attorney. Last time you were here. . . I told you at that time that you had to be prepared to go forward with this case the next time it was put on the calendar because I could not, in good conscience, keep putting the defendant's attorney through the expense of getting ready for trial and having witnesses here and coming to the hearing. And

for a judge to be traveling to Cincinnati, from Cincinnati, or elsewhere, to Chicago to hear your claim.

Ms. Jefferson: I understand.

Judge Roketenetz: Now, I'm not sympathetic to your request for a continuance at this time. . .

Ms. Jefferson: Your honor, what could I do when it's hard to get a maritime lawyer. I could send you names that I have called. What is it for me to do, a maritime lawyer is hard to get.

Judge Roketenetz: Well then, you have to make a decision whether you're going to prosecute the claim yourself, or whether you are going to try to keep finding a lawyer. I'm not going to keep continuing it for you to do that. And I'm very empathetic with your health condition and the problems that you're having. But, the fact is, I'm not going to keep on continuing this case and put the government and the defendant's counsel to the expense of getting ready for trial for your case every few months because you can't find a lawyer, or you haven't made a diligent effort to find a lawyer. Why isn't he or she here?

Ms. Jefferson: He stated that, to tell you to make a, he told me to appear and tell you to get a continuance. He told me I had to show up this morning, Your Honor.

Judge Roketenetz: But you don't even know the person's name. I mean, how do you expect me to accept what you're telling me? You don't even know this person's name, ma'am.

Ms. Jefferson: I recently, I did bring, I had the information on me, just yesterday I did. I recently got in touch with him.

Judge Roketenetz: But, you know what, we were here last March and you were told to start your search for a lawyer then.

Ms. Jefferson: I did.

Judge Roketenetz: This case had been noticed since August of this year. You've had, and I just don't understand why he was just recently contacted. You can't wait until last minute to do this stuff.

Upon further questioning, it was revealed that this unnamed attorney had not yet seen the Claimant's file and had not definitively taken Ms. Jefferson's case. Ms. Jefferson continued to assert that she had tried to procure counsel and that she was unable to, in part due to the fact that her file was not complete and was allegedly being retained by her former counsel, Mr. Wilson. Ms. Jefferson again stated that she did not want to proceed until she was given her whole file back from Mr. Wilson. As such, I issued the following instructions:

I'll tell you what I am going to do. I'm going to issue a Show Cause Order, and I'm going to give you time to respond to it. I'll give you 20 days to respond to the Show Cause Order why I shouldn't dismiss this claim. . . That way, if you have an attorney who represents you now, I suggest that your attorney do two things. Number one, that he file an appearance. . . And number two, that he respond to the Show Cause Order on your behalf. If he doesn't do that. . . then I'm dismissing the claim.

On October 21, 2003, I issued a Show Cause Order as to why the Employer's motion for dismissal of the claim for abuse of process or for failure to prosecute the claim should not be granted. The Claimant responded on November 10, 2003, *pro se*. Ms. Jefferson recounted her difficulties with obtaining legal counsel and also stated that she did not receive the Employer's evidentiary packet, including her answers to interrogatories and her deposition testimony, until October 17, 2003. She further stated that Curt Picou, Esq., had counseled her to make an appearance at the October 15, 2003 hearing, even without counsel. Ms. Jefferson further asserts, "Attorney Picou advised me that he would try to get me legal representation; therefore, I asked the court to extend to me a continuance to obtain legal representation." Since the October 15, 2003 hearing, no attorney has filed an appearance as the Claimant's counsel.

Analysis of Law:

An administrative law judge's authority to dismiss a claim based on a Claimant's failure to prosecute stems from 29 C.F.R. 18.29(a), which affords the administrative law judge all necessary powers to conduct fair and impartial hearings and to take any appropriate action authorized by the Federal Rules of Civil Procedure. Rule 41(b) provides for involuntary dismissal of a claim for failure of the Claimant to prosecute or fully comply with the rules or any order of the court. Under the law of the Seventh Circuit,¹ a dismissal for lack of prosecution is appropriate when there is "a clear record of delay or contumacious behavior." 3 Penny Theater Corp. v. Plitt Theaters, Inc., 812 F.2d 337, 339 (7th Cir. 1987) (emphasis added); (quoting Zaddack v. A.B. Dick Co., 773 F.2d 147, 150 (7th Cir. 1985) and Webber v. Eye Corp., 721 F.2d 1067, 1096 (7th Cir. 1983)).

In this case, there is a clear record of dilatory conduct by the Claimant. Ms. Jefferson has repeatedly failed to be ready to proceed with the hearings as scheduled. At each of the three hearings before the undersigned, the Claimant requested a continuance in order to secure legal counsel. Despite my warnings that the claim would be dismissed, Ms. Jefferson did not attain counsel. Moreover, her efforts to find counsel do not appear diligent. Specifically, at the October 2003, hearing, Ms. Jefferson appeared and requested yet another continuance despite my warnings that the claim would be dismissed. Moreover, she asserted that she had legal counsel, but admitted that he had yet to see her file and that she had just met with him the day prior. The continuance granted on March 19, 2003, provided the Claimant with seven months to secure legal counsel. However, the Claimant's attempts appeared to occur only days prior to the scheduled hearing. The Claimant has consistently received ample notice of upcoming hearing dates, and yet still appears to wait until the eve of the hearing. Such conduct is indicative of a lack of diligence in prosecuting this claim.

Ms. Jefferson asserted at the October 15, 2003 hearing that she did not want to proceed because she did not have half of her

¹ The Claimant resides in Illinois and the Employer's offices are headquartered in Indiana, both of which fall under the Appellate jurisdiction of the Seventh Circuit Court of Appeals. Additionally, the injury at issue allegedly occurred while the Claimant was working for Federal Marine Terminals in Chicago, Illinois. As such, the case law of the Seventh Circuit is controlling.

file and her deposition. Ms. Jefferson stated that her former counsel, Mr. Wilson, had retained some of her file. She also stated that she had gone to Mr. Wilson's office and that he refused to give her the file back.

Initially, I note that the failure of the Claimant to retrieve her file from Mr. Wilson further evidences her dilatory behavior. Ms. Jefferson states that she has tried to retrieve her file and yet Mr. Wilson refused to give it to her. Such an assertion seems suspect; I can think of no reason for Mr. Wilson to refuse to give the Claimant her file. Furthermore, at the hearing, I stated that if indeed Mr. Wilson refused to give her the file, she should file a complaint with the Bar Association. Ms. Jefferson stated that she "didn't know that" and that she was "going to get in touch with the Bar Association and file a complaint." Ms. Jefferson was indeed aware of this avenue, and yet, apparently never pursued it. Prior to the March 2003, hearing, during a telephone conversation with the Claimant regarding this same issue, my attorney-advisor advised the Claimant to contact the Bar Association in order to retrieve her file. Such an attempt was never made. Even if I found the Claimant's assertions concerning Mr. Wilson holding her file to be credible, I find her failure to diligently pursue the return of her file indicative of her overall lack of diligence in prosecuting this claim.

Furthermore, any argument that her prior counsel has delayed her pursuit of the claim does not displace the Claimant's responsibilities. The ruling case law in the Seventh Circuit fails to support the assertion that a party can avoid the consequences resulting from acts or omissions of that party's freely selected agent. Pyramid Energy, Ltd. v. Heyl & Patterson, 869 F.2d 1058 (7th Cir. 1989). Any attorney misconduct that may or may not have taken place does not excuse the Claimant from continuing her pursuit of this claim.

While no lesser sanctions have been previously imposed for the Claimant's failure to be prepared for hearing, the Claimant did receive at least two warnings prior to dismissal. The imposition of lesser sanctions is not a prerequisite to dismissal. Patterson v. Coca-Cola Bottling Co., 852 F.2d 280, 284 (7th Cir. 1988). As the Seventh Circuit stated in Hall Commodity Cycle Management Co. v. Kirsh, 825 F.2d 1136, 1139 (7th Cir. 1987), a court "is not required to fire a warning shot." The Claimant received multiple oral warnings that I would dismiss this claim if she was not ready to proceed at the October 15, 2003 hearing. Such warning has been cited by

appellate courts when finding a dismissal of a claim justified. See Locascio v. Teletype Corporation, 694 F.2d 497 (7th Cir. 1982). Specifically, I note the clear warning issued at the October 15, 2003, hearing wherein I stated that I would dismiss the claim if her counsel did not file an appearance and respond to the Show Cause Order. Ms. Jefferson, as a *pro se* Claimant, did reply to the Show Cause Order. However, such a response does not address my concern that this case, if not dismissed, would be perpetually continued at the expense of the Employer and judicial resources.

The Claimant has argued that dismissing her claim would violate her right to due process of law. It is true that a dismissal, with prejudice, because it cuts off the Claimant's access to courts, is a harsh sanction. However, "Rule 41(b) serves not only to protect defendants but also to aid courts in keeping administrative control over their own dockets and deter other litigants from engaging in similar dilatory behavior." Penny Theater Corp. v. Plitt Theatres, Inc., 812 F.2d 337, 340 (7th Cir. 1987) (*quoting* Washington v. Walker, 734 F.2d 1237, 1239 (7th Cir. 1984)). A trial judge is responsible for preventing undue delays and further wastes of judicial resources. Therefore, dismissal of a claim when warranted is clearly within the authority and responsibility of trial judges.

The Employer has also expended great resources in defending this claim. The Employer was ready to proceed with the merits of the Claimant's case on two separate hearing dates. Additionally, the Employer conducted extensive discovery in preparation for the hearings. The Seventh Circuit has stated that the defendant need not show that it has been prejudiced by the delays. Daniels v. Brennan, 887 F.2d 783 (7th Cir. 1989). Although dismissal with prejudice serves in part to protect defendants, the dismissal also serves the court as noted above.

Conclusion:

Based on the totality of the facts and circumstances in this case, I find the Claimant's actions indicate sufficient dilatory conduct to warrant a dismissal of this case for want of prosecution. The Claimant has requested four continuances, three of which were to allow the Claimant time to procure legal counsel. I find a pattern of behavior which infers that the Claimant is not diligently pursuing this claim by retaining counsel or retaining portions of her file that have been out of her possession for over a year. Case law firmly establishes

that, in light of the Claimant's particular procedural history, dismissal of this claim is an appropriate sanction.

In light of the harsh nature of this sanction, I will reinstate this claim and vacate this order if an attorney for the Claimant, within twenty (20) days from the issuance of this Order of Dismissal, files an appearance with this court giving a reasonable date at which they will be ready to proceed with the hearing so that this claim may be fully adjudicated on the merits.

ORDER

IT IS ORDERED that Sarah Jefferson's claim for compensation under the Longshore and Harbor Workers' Compensation Act IS HEREBY DISMISSED.

A

DANIEL J. ROKETENETZ
Administrative Law Judge